No. 11-798

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
KATE COMERFORD TODD
SHELDON GILBERT
National Chamber Litigation Center
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

JEFFREY BOSSERT CLARK*
ADITYA BAMZAI
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
jeffrey.clark@kirkland.com

* *Counsel of Record*

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTERESTS OF *AMICUS CURIAE*[*]

Amicus the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business. More specifically, the Chamber has filed briefs in several of this Court's key market participant doctrine cases, including *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008); *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"); and *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986).

The Chamber files this brief to address a mistaken trend in Ninth Circuit case law. Contrary to this Court's precedent and the opinions of sister circuits, the Ninth Circuit engrafted into the express-preemption provisions of the Federal Aviation Administration Authorization Act ("FAAAA") a broad "market participant" doctrine exception that Congress did not see fit to create. In this case, by decree-

---

[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

ing the terms for contracts between private shippers and truck operators and ostracizing dissenting truckers from the Port, the Port of Los Angeles has engaged in regulation of significant concern to *amicus* and the members it represents — regulation that the FAAAA preempts for the reasons explained below.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves "Concession Plans" that the Port of Los Angeles has adopted to limit the ability of shippers to contract with truckers transporting ("draying") shipping containers to or from the Port. The Port insists that the Plans establish voluntary contracts despite the fact that the Plans (1) are incorporated into a municipal ordinance backed by criminal sanction; (2) form part of a published tariff enforceable under the federal Shipping Act of 1984; and (3) have the primary purpose of "ameliorat[ing] adverse environmental effects" by "creating incentives for concessionaires to use clean and efficient trucks." Pet. App. 226a.

Federal law preempts these Plans. It is well-settled that, when a federal law contains an express preemption clause, this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993); see also *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011). The plain text of the Federal Aviation Administration Authorization Act ("FAAAA") preempts contrary state provisions that have the "force and effect of law." 49 U.S.C. § 14501(c)(1), § 14506(a). This Court has established

that "the phrase 'having the force and effect of law' is most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995) (some quotation marks and modifications omitted). There is no dispute that the relevant aspects of the Plans come within the scope of the FAAAA's preemption provisions if they have the requisite "force and effect of law."

The panel below disregarded these bedrock propositions and plain text to hold that the Port's adoption of the Concession Plans was not subject to preemption under the FAAAA because the Plans were supposedly implemented in the Port's proprietary capacity. Drawing on cases from the dormant Commerce Clause context, the panel held in relevant respect that (i) the Port could mandate that trucks have a plan for using off-street parking facilities *outside of the Port*, see Pet. App. 38a, and (ii) mandate the use of placards on trucks, see *id.* at 44a, because the Port was acting in a proprietary, not regulatory capacity. Specifically, the panel determined that, "[p]rior to the enactment of concession agreements, community members complained that drayage trucks regularly parked in surrounding neighborhoods, posing safety and health risks. The Port believed that off-street parking would mitigate drayage trucks' negative impacts and increase the community good-will necessary to facilitate Port expansion." *Id.* at 40a. And the panel further reasoned that the "placard provision is proprietary in nature" and therefore not preempted, because it was adopted "in response to community concerns" and "invites community participation and increases goodwill." *Id.* at 46a. In the panel's words, "[e]nhancing good-will in the commu-

nity surrounding the Port is an important and, indeed, objectively reasonable business interest." *Id.* at 40a.

Amicus respectfully submits that this brand of analysis cannot be the touchstone of FAAAA preemption. To the contrary, it is often the case that disregarding a federal statute's preemptive scope will promote local goodwill. Yet the whole point of preemption doctrine is to ensure that the Nation's public policy goals prevail over local concerns when Congress has explicitly spoken on a subject within its authority.

Indeed, the FAAAA's preemption provisions were enacted to deregulate an encrusted federal regulatory regime as well as to eliminate the patchwork of burdensome state trucking regulations that had grown up alongside that now-defunct body of federal regulation. Congress's purpose was to ensure that state governments would not undo federal deregulation with re-regulation of their own. See *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Thus, the FAAAA expressly provides that the critical inquiry is whether the state rules have the "force and effect of law." The Concession Plans at stake here undoubtedly do. The Plans are an out-and-out sovereign licensing scheme for regulating trucking markets weakly masquerading as mutual contracts. Such a licensing scheme with the "force and effect of law" does not comport with the text of the FAAAA. The Port's incorporation of the Plans in its Tariff 4 dispels any doubt about the Plans' regulatory nature. See 46 U.S.C. § 40501(f).

The implications of this case are deep and have the potential to cut across the entire field of federal

regulation. Even if this case did not involve specific facts that are themselves remarkable — the imposition of a licensing regime by the municipal government that hosts the largest port in the Nation denying access to truck operators unless they submit to regulations establishing how drayage trucks can operate — this case would still be of immense significance. The off-street parking and placard requirements, seen in the narrowest light, "may be * * * the obnoxious thing in its mildest and least repulsive form," but as this Court has elsewhere remarked, such "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011) (quoting *Boyd* v. *United States*, 116 U.S. 616, 635 (1886)).

In short, these regulations are the camel's nose under the FAAAA's express preemption tent. If the court below is allowed to declare as market participation entire swaths of regulation in the environmental and safety areas, and municipalities are emboldened to issue edicts vaguely designed to ensure nothing more than good relations with private neighbors, then the express-preemption provisions in federal statutes will fall prey to ready circumvention.

ARGUMENT

I. The Ninth Circuit erroneously held that the FAAAA does not preempt the Concession Plans.

When a federal law contains an express preemption clause, this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evi-

dence of Congress' preemptive intent." *Easterwood*, 507 U.S. at 664. The panel departed from that teaching and bolted onto the FAAAA a market-participant exception wholly absent from the plain language of the statute.

A. The FAAAA expressly preempts state provisions that have the "force and effect of law."

Both of the provisions of the FAAAA that are relevant here expressly preempt contrary provisions that have the "force and effect of law." The FAAAA unambiguously provides that "a State [or] political subdivision of a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The FAAAA also prevents States and their political subdivisions from enacting or enforcing any "provision having the force and effect of law that requires a motor carrier * * * to display any form of identification on or in a commercial motor vehicle * * * other than forms of identification required by the Secretary of Transportation." § 14506(a).

In *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), this Court interpreted the meaning of the phrase "force and effect of law" in the context of a similar preemption provision contained in the Airline Deregulation Act of 1978 (ADA). *Wolens* explained that "the phrase 'having the force and effect of law' is most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *Id.* at 229 n.5 (some quotation marks and modifications omitted); see also *id.* at 240

(O'Connor, J., dissenting in part) ("action to invoke the State's coercive power * * * by means of a generally applicable law" is action "having the force and effect of law"); U.S. Br. 9 ("Any common-sense understanding of the term 'force and effect of law' is satisfied by a provision backed by criminal penalties which only a state and not a mere proprietor can enforce.") (some quotation marks omitted).

As a result, under *Wolens*, "privately ordered obligations * * * do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law'" within the meaning of the ADA. *Id.* at 228-229. By contrast, where a state enacts "binding standards of conduct that operate irrespective of any private agreement," such provisions clearly have the "force and effect of law" and are accordingly preempted. See also *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 329 (2008) (addressing regulation under the Medical Device Amendments of 1976 that sets forth a "'general rule' pre-empting state duties 'having the force and effect of law (whether established by statute, ordinance regulation, or court decision)").

The congressional instruction to preempt any "other *provision* having the force and effect of law," 49 U.S.C. § 14501(c)(1) (emphasis added), expresses an intent to preempt not just laws that are labeled as statutes or regulations, but also forms of state and local action that effectively operate as laws, regardless of their label. It therefore requires a broader construction than the many preemption provisions that do not come equipped with such anti-circumvention language. See, *e.g.*, 2 U.S.C. § 453(a) ("preempt any provision of *State law* with respect to

election to Federal office") (emphasis added); 6 U.S.C. § 488g(b) ("preempts *the laws of any State* to the extent that such laws are inconsistent with this part * * * .") (emphasis added); 15 U.S.C. § 5903 ("This chapter shall supersede any provision of *State law* (*or the law of any political subdivision of a State*) * * * .") (emphasis added).

B. The Port's Concession Plans have the "force and effect of law."

There can be little dispute that the Concession Plans have the "force and effect of law." While nominally described as calling for "contracts" or "agreements," the Concession Plans are essentially a state licensing scheme restricting access to the Port in furtherance of regulatory-style goals.

First, as part of its approval of the Concession Plans, the Port issued a broad prohibition providing that, effective October 1, 2008, "no Terminal Operator shall permit access into Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day pass from the Port of Los Angeles." Pet. App. 12a. The Port thus set as a background rule a prohibition on access to the Port, with a requirement that drayers receive permits to obtain such access.

Second, it is undisputed that the Port does not, pre- or post-Concession Plan, participate in transactions between shippers and drayers carrying container traffic into and out of the Port. See, *e.g.,* Pet. App. 6a, 43a (Ninth Circuit decision after trial), 221a-222a (initial Ninth Circuit interlocutory appeal) 255a, 257a, 259a (initial District Court preliminary injunction decision).

This is not a case, in other words, of the Port establishing the contract terms for an agreement between itself and the providers of drayage services. Nor does this case involve state enforcement of privately ordered obligations between motor carriers and terminal operators. Instead, the Port here requires that drayers accept certain provisions in order to obtain and to retain the right to do business with shippers that use the Port to import and export cargo.

Third, reinforcing that they have the "force and effect of law" under the FAAAA, the Concession Plans are expressly incorporated into statutory law in two significant ways. As an initial matter, they are embodied in a local municipal ordinance backed by the threat of criminal prosecution. See Pet. 31; see also Pet. App. 83a n.5.

In addition, the Concession Plans are part of the Port's "Tariff No. 4." Pet. App. 83a (trial findings); see *id.* at 183a, 203a, 212a, 241a. Tariff No. 4 plainly provides that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Temporary Access Permit" and that the "terms and conditions for the Concession are set forth in the Port of Los Angeles Concession Agreement between the Port of Los Angeles and the Licensed Motor Carrier." Port of Los Angeles, Tariff 4, Section 20, Clean Air Action Plan — General Rules and Regulations, Item No. 2040, *available at* http://www.portoflosangeles.org/Tariff/SEC20.pdf (last visited Feb. 20, 2013). Tariff 4 was made publicly available via posting on the Internet. *Ibid.* Any failure to comply with the tariff (and thus the Concession Plans) can give rise to criminal penal-

ties, including a misdemeanor conviction, fines, and imprisonment. JA85.

Moreover, as part of the Port's tariff, the Concession Plans are subject to review by the Federal Maritime Commission (FMC). See, *e.g., New York Shipping Ass'n* v. *FMC*, 854 F.2d 1338 (D.C. Cir. 1988) (affirming Federal Maritime Commission assertion of jurisdiction over tariffs); *Plaquemines Port, Harbor and Terminal Dist.* v. *FMC*, 838 F.2d 536 (D.C. Cir. 1988) (holding the FMC had jurisdiction over port offering essential services and controlling access to private facilities). Indeed, the Port submitted the Plan to the FMC for review. See Agreement 201196 (submitted Sept. 30, 2008), *available at* www2.fmc.gov/agreement_lib/201196-000.pdf (last visited Feb. 20, 2013).

Hence, pursuant to the Shipping Act of 1984, marine terminal operator agreements like the Concession Plans unavoidably carry the force of law, because they are "enforceable by an appropriate court as an implied contract *without proof of actual knowledge of its provisions*." 46 U.S.C. § 40501(f) (emphasis added). Such provisions are deemed "contracts" only by operation of a legal fiction, since in actuality they are fully enforceable under federal law once adopted by a port and made publicly available. The Port's submission of the Concession Plans (and consequent triggering of Section 40501(f)) is inconsistent with its litigating position that it is acting as a market participant.

Fourth, it is undisputed that: (i) the Port earns all or much of its revenue based on the amount of container traffic transiting the Port; (ii) the Concession Plans will drive up drayage contract pricing, increasing shipping costs; and (iii) the Concession plans will

thereby cause at least a three percent diversion of container traffic to other ports. See Pet. App. 29a (Ninth Circuit appeal after trial); 89a (Finding of Fact ¶ 80); 216a ("'additional components of the Concession agreements,' [include] 'creating a 'market characterized by the presence of fewer, generally larger and more stable' licensed motor carriers. Los Angeles Board Resolution 6522."); see also *id.* at 89a (Finding of Fact ¶ 79). The whole point of the Concession Plans was to drive up the costs for drayage services, thereby reducing demand and/or incentivizing a shift to newer-generation heavy-duty diesel trucks. It is axiomatic that reducing supply leads to higher prices. See, *e.g.*, *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 777 (1999) ("price will * * * rise in order to limit demand to the reduced supply"). It follows that the Port's purpose was not to promote business development at the Port, but rather to further the City's environmental policies.

Just as this Court explained in *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008), so too here:

> It is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant. AB 1889 is neither "*specifically tailored* to one particular job" nor a "legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S., at 291. As the statute's preamble candidly acknowledges, the legislative purpose is not the efficient procurement of goods and services, but the furtherance of a labor policy. See 2000 Cal. Stats. ch. 872, § 1.

Id. at 70 (emphasis added). If the Port could simply recharacterize its regulatory environmental interests as proprietary business interests (as it sought to do in opposition to certiorari, see Opp. 17 n.8), that would create an exception to the express preemption directive through which a (drayage) truck could be driven.

Taken together, these legal sanctions and requirements demonstrate that the Concession Plans have the "force and effect of law." Indeed, the Ninth Circuit did not seriously suggest to the contrary. And the Port itself has effectively conceded that the Concession Plans have the "force and effect of law" within the meaning of the statute:

> Even if a measure enacted by a state entity has such force and effect, that does not mean that the measure is regulatory or that the market participant doctrine otherwise does not apply. *It means merely that the measure falls within the language of section 14501(c).* Whether the market participant doctrine is applicable is a separate question.

Opp. 13 (emphasis added). That a "measure falls within the language of" an express preemption provision is not a "mere[]" curiosity to be so easily dismissed; it should terminate the judicial inquiry. The Port's circular argument, assuming the very point at issue (whether judicial exceptions to FAAAA preemption can properly be created), see *King* v. *Vincent's Hosp.*, 502 U.S. 215, 222 (1991), should be rejected. The "scheme is tantamount to regulation," *Gould*, 475 U.S. at 287 (emphasis added), and thus preempted.

C. There is no reason to engraft a judicially created market participant exception into the FAAAA.

Rather than relying on the FAAAA's plain text and this Court's precedents construing comparable language, the Ninth Circuit read into the FAAAA a "market participant" doctrine based on jurisprudence under the dormant Commerce Clause. The Port similarly contends that courts must always undertake an additional non-textual "market participant" analysis engrafted onto express preemption provisions written by Congress. That conclusion is incorrect for several reasons.

First, and as explained above, any importation of market participant doctrine into the FAAAA cannot be reconciled with the statute's text. Under the relevant FAAAA provisions, *all* provisions that have the "force and effect of law" are preempted regardless of whether the State purports to act in its regulatory or proprietary capacity. There is no warrant in the statute for drawing a distinction based on the intentions behind the enactment of a particular law.

The pivot point for determining the extent of preemption in a statute with an express-preemption provision is the intent of Congress, not the constitutional objectives of dormant Commerce Clause doctrine. The dormant Commerce Clause establishes background rules of constitutional protection for our "national 'common market.'" *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). Once Congress acts, however, the default rules of the dormant Commerce Clause, which includes a narrowly tailored market participant doctrine, are subject to change. "[T]he 'market partici-

pant' doctrine reflects the particular concerns underlying the Commerce Clause, *not any general notion regarding the necessary extent of state power in areas where Congress has acted*." *Gould*, 475 U.S. at 289 (emphasis added).

That distinction is particularly important here because the objective of the FAAAA is not simply to prevent States and localities from fracturing the national common market in the transportation of goods — a concern that overlaps with the dormant Commerce Clause — but *to deregulate* that market. See *Rowe*, 552 U.S. at 368 (describing deregulatory and preemptive purposes of the Motor Carrier Act of 1980 and the FAAAA); see also *id.* at 370-371 (observing that the Court determined in *Morales* v. *TWA, Inc.*, 504 U.S. 374, 390 (1992), that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives"). The scope of preemption under the FAAAA, in other words, is not the same as the scope of unconstitutional state/local government conduct under the dormant Commerce Clause.

In this regard, this case differs from this Court's holding in *Boston Harbor*. That case involved the judicial doctrine of implied preemption created to protect the policies of the National Labor Relations Act ("NLRA") in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1956). In *Boston Harbor*, this Court recognized a market-participant exception to *Garmon* preemption. See 507 U.S. at 231 (a State can manage its "own property [by] pursu[ing] its purely proprietary interest * * * where analogous private conduct would be permitted."). The Court upheld the City of Boston's contractual requirements

from challenge because they were designed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost," and for that reason, the City was "acting as [a] proprietor rather than regulator." *Id.* at 228. Critically, the NLRA contains no express preemption provision like that in FAAAA Section 14501(c)(1). Where an act contains an express preemption provision, as here, the scope of preemption must mirror the scope of the provision. See *Easterwood*, 507 U.S. at 664.

Second, the structure of the FAAAA supports this interpretation. The FAAAA's preemption provisions contain a series of exceptions limiting their scope. For example, section 14501(c)(2) lists a series of "matters not covered" by the preemptive scope of section 14501(c)(1), including "the safety regulatory authority of a State with respect to motor vehicles [etc.]" 49 U.S.C. § 14501(c)(2). The same is true of section 14506. Under that provision, several express "[e]xception[s]" to the prohibition against requiring display of identification are listed, including exceptions permitting a State to continue to require a display of credentials under the International Registration Plan, the International Fuel Tax Agreement, or a "State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate." *Id.* §§ 14506(b)(1)-(3).

Where such exceptions are expressly provided, it is inappropriate to imply others. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 87-88 (2006) ("The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions."); *Rowe*, 552

U.S. at 374 (observing that the FAAAA "explicitly lists a set of exceptions (governing motor vehicle safety, certain local route controls, and the like), but the list says nothing about public health"); see also *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Third, the straightforward reading of the FAAAA's express-preemption provision is bolstered by the fact that other statutes contain explicit "market participant"-style language. See *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 375-376 (1958) ("In light of the much other so-called antitrust legislation enacted prior and subsequent to the Clayton Act, it seems plain that the rule expressio unius exclusio alterius is applicable, and that the definition contained in § 1 of the Clayton Act is exclusive.") (footnote omitted).

For example, in enacting the materially identical preemption provision in the ADA, Congress provided expressly for a proprietary exception for municipally owned airports. See 49 U.S.C. § 41713(b)(3). See also 15 U.S.C. § 2075(b) (allowing a federal, state, or local government to "establish[] or continu[e] in effect a safety requirement applicable to a consumer product for its own use" under certain circumstances); cf. 49 U.S.C. § 30103(b)(1) (allowing federal, state, or local governments to "prescribe a standard for a motor vehicle or motor equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard"). The existence of these provisions amply demonstrates that, where Congress wants to include a market participant exception in a statute, it knows how to do it. It did not do so here.

Fourth, the market participant doctrine — as conceived by the panel — is extraordinarily malleable. The very facts of this case demonstrate how a State could mask its public-policy-driven actions as actions taken in its "proprietary capacity."

As the first Ninth Circuit panel explained, the Concession Plans were trying to solve a perceived market failure — classic regulatory action. The record in the case readily demonstrates that a "significant purpose behind the Concession agreements was purely environmental." Pet. App. 226a. The Plans "sought to ameliorate [ ] adverse environmental effects by forcing a direct contractual relationship upon the motor carriers, by mandating vehicle maintenance requirements, and by enhancing motor carrier efficiency while creating incentives for concessionaires to use clean and efficient trucks." *Id.* And "[a] mere reading of some of the stated purposes of the Los Angeles Board, for example, underscores an extensive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation." Pet. App. at 225a-226a; see also *id.* at 153a n.2 (district court opinion agreeing that "enjoining the implementation of the Concession agreements will stop cold the clean up of port trucks") (quotation marks omitted).

The Port's principal defense at the outset of these proceedings was that it had "plenary" sovereign power over tidelands and hence its actions were immune from preemption. See Pet. App. 250a. The district court repeatedly rejected this argument, including after a full trial. See *id.* at 105a, 112a-113a. But the key point is that the Port's theory that it could exercise exclusive sovereignty over port lands is quite dif-

ferent from the Ninth Circuit's theory that the Port was simply wielding power over property in the same way an ordinary private citizen or corporation would attempt to do via voluntary contract.

Indeed, the Port's intent was clearly to tame the market. The Port commissioned "expert testimony" that "the economics of an independent owner-operator based drayage system creates perverse incentives for independent owner-operators to skimp on maintenance." *Id.* at 126a. That expert conclusion, however, is directly contrary to the conclusion that Congress reached in enacting the FAAAA as a deregulatory statute designed to preserve the ordinary functioning of the private market. See *Rowe*, 552 U.S. at 368.

Interference with private transactions in this fashion is a kind of genetic marker for sovereign conduct and not mere market participation. Here, "the State interfered with the *natural functioning* of the interstate market either through prohibition or through burdensome regulation." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (emphasis added). Simply put, there is no reason to graft into the FAAAA an atextual market participant exception that permits a State to regulate transportation in the guise of acting in its proprietary capacity.

Fifth and finally, in incorporating the market participant doctrine into the FAAAA, the panel opinion broadened the scope of the limited market participant exception recognized in dormant Commerce Clause jurisprudence. "The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State

may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 97 (1984) (plurality). This Court has repeatedly held that to claim the protections of the doctrine, the governmental unit in question must not be pursuing policy aims but instead must be engaging in unalloyed proprietary activity. Under the doctrine, a government is "managing its own property [by] pursu[ing] its *purely* proprietary interest * * * where analogous private conduct would be permitted." *Boston Harbor*, 507 U.S. at 231 (emphasis added). The analysis reduces to "a single inquiry: whether the challenged program constitute[s] *direct* [S]tate participation in the market." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 435 n.7 (1980) (quotation marks omitted). See also generally *Boston Harbor*, 507 at 227-232.

Applying these principles, the Fifth Circuit has held that mere ownership of a facility does not make a government entity a participant in a market operating on that facility's premises. See *Smith* v. *Dep't of Agric.*, 630 F.2d 1081 (5th Cir. 1980). In *Smith*, the Fifth Circuit invalidated rules adopted by Georgia's Department of Agriculture that gave non-residents inferior sales locations in a farmers' market owned and operated by the State. *Id.* at 1082. The Fifth Circuit rejected the State's argument that it was acting as a market participant. The court noted that no arm of the State "produce[d] the goods to be sold at the market" or "engage[d] in the actual buying or selling of those goods." *Id.* at 1083. Instead, the State had "simply provided a suitable marketplace for the buying and selling of privately owned goods." *Ibid.*; see also *Florida Transp. Servs., Inc.* v. *Miami-Dade*

Co., 703 F.3d 1230 (11th Cir. 2012). Here, the Port's regulations have the same effect as the invalidated regulation in *Smith*, and in fact go further by interposing a state-established and state-run licensing regime on the private agreements of shippers and drayers at the largest Port in the Nation.

The panel sought to get around these limitations on the market participant doctrine by relying on this Court's decision in *Alexandria Scrap*. See Pet. App. 24a ("The Supreme Court has applied the market participant doctrine to a case *not* involving 'procurement' of goods * * * [i]n *Hughes* v. *Alexandria Scrap Corp.*") (emphasis added). The panel appeared to suggest that the State of Maryland was not purchasing anything in *Alexandria Scrap*. But this is directly contrary to how the Court described Maryland's program, which resulted in the purchase of wrecked hulks, albeit for the purpose of ridding the State of such inoperable vehicles. "[U]ntil today the Court has not been asked to hold that the *entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce* creates a burden upon that commerce if the State restricts *its trade* to its own citizens or businesses within the State." *Alexandria Scrap*, 426 U.S. at 808 (emphasis added). It was the dissent in *Alexandria Scrap* that argued that it could not "agree with the Court that this case is solely to be analyzed in terms of Maryland's 'purchase' of items of interstate commerce * * * ." *Id.* at 819 (Brennan, J., dissenting). *Alexandria Scrap* cannot support the panel's expansion of the market participant doctrine.

Accordingly, the panel erred in two significant respects: by importing the dormant Commerce Clause's

market participant doctrine into the FAAA in the first place, and then by giving that doctrine a broader reading than this Court has given it in the dormant Commerce Clause context.

CONCLUSION

For these reasons and those stated in petitioner's brief, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
KATE COMERFORD TODD
SHELDON GILBERT
National Chamber Litigation Center
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

JEFFREY BOSSERT CLARK*
ADITYA BAMZAI
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
jeffrey.clark@kirkland.com

* *Counsel of Record*

Counsel for Amicus Curiae

FEBRUARY 22, 2013